UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ART, LLC And UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case	18-CA-168725
GLEN LAKE'S MARKET, LLC And UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case	18-CA-168726
THOMAS B. WARTMAN And UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case	18-CA-168727
THOMAS W. WARTMAN And UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case	18-CA-168728
VICTORIA'S MARKET, LLC And UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case	18-CA-168729

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. STATEMENT OF THE CASE

The case was heard by Administrative Law Judge Charles Muhl from February 1, 2017 through February 3, 2017. ALJ Muhl issued a Decision[1] on July 3, 2017 in which he found that Respondents' Section 303 claim in their lawsuit against the Union did not lack a reasonable basis, but their state law claims did lack reasonable bases and were filed with a retaliatory motive, in violation to Section 8(a)(1) of the Act. On August 14, 2017, Counsel for the General Counsel filed exceptions to ALJ Muhl's conclusion and related findings that Respondents' Section 303 claim did not lack a reasonable basis when it was filed, and therefore, was not unlawful under Section 8(a)(1) of the Act. The same day, Respondents filed exceptions to the ALJ's findings and conclusions that Respondents' state law claims in their lawsuit violated the Act.[2]

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits its Answering Brief in Opposition to Respondents' Exceptions and supporting brief.

II. STATEMENT OF FACTS

Counsel for the General Counsel respectfully directs the Board to its statement of facts submitted in its Exceptions Brief, dated August 14, 2017.

III. ARGUMENT

Respondents have excepted to certain of the ALJ's findings of fact and conclusions of law with respect to the state law claims in Respondents' lawsuit. The following analysis of the record evidence and the relevant, well-established Board law is offered in opposition to Respondents' exceptions and briefs. Counsel for the General Counsel submits that the record

[1] References to the ALJ's Decision will appear as "JD _" with the page number and line numbers referenced.
[2] References to Respondents' Brief in Support of Exceptions will be abbreviated as "Resp. Br."

evidence and applicable Board law fully support the ALJ's findings and conclusions with respect to Respondents' state law claims.

A. The ALJ Correctly Found that Wartman Senior, Wartman Junior, and ART LLC Can and Should Be Held Liable for the Unfair Labor Practice

Respondents' first exception is based on the ALJ's decision to hold Respondents Wartman Senior, Wartman Junior, and ART LLC liable for the unfair labor practice. Respondents argue that because Wartman Senior, Wartman Junior, and ART LLC were not found to be statutory employers, they cannot be held liable for filing the retaliatory lawsuit. Resp. Br. 11. However, Respondents' argument is contrary to relevant Board precedent. The relevant cases were cited by Counsel for the General Counsel in its post-hearing brief but completely ignored by Respondents.[3]

In *Manno Electric, Inc.*, 321 NLRB 278, 278 fn. 3 (1996), *enfd*. 127 F.3d 34 (5th Cir. 1997), the Board held both Manno Electric, (a company) and its President, Jack Manno Sr., liable for filing a retaliatory lawsuit against the union in state court. The Board did not find Jack Manno to be an employer, yet found it was appropriate to include him as an individual respondent "in order to avoid frustrating the remedial purposes of the Act." *Id.* The Board noted it was unnecessary to determine whether individual respondent Jack Manno was an alter ego of Respondent Manno Electric in order to order both entities to cease and desist prosecuting the portions of the lawsuit found to be unlawful. *Id*.

[3] The Board generally deems as waived any arguments not made to the Administrative Law Judge in the underlying proceeding. See e.g., *Conditioned Air Systems, Inc.*, 360 NLRB 789, 789 fn. 2 (2014) (the Board deeming Respondent's arguments first raised in its exceptions waived as untimely raised); *Smoke House Restaurant*, 347 NLRB 192, 195 (2006) (same). Respondents make the argument that based on statutory employer status, Respondents Wartman Senior, Wartman Junior, and ART LLC cannot be held liable for the unfair labor practice for the first time in their Brief in Support of Exceptions. As such, the Board should deem the argument untimely filed and dismiss it as waived, in addition to dismissing it on the merits.

In the underlying Administrative Law Judge's opinion, which the Board affirmed, the Judge found that the company and Manno were acting "in concert and jointly" in bringing the state court suit, and "were acting together and for each other" since they were each plaintiffs in that state court suit. *Id.* at 295. Further, "if Manno were permitted to bring the state lawsuit, without prejudice, he would be obtaining for Manno Electric indirectly what Manno Electric could not obtain directly, the pressing of an alleged illegal state lawsuit against the Union for which Manno Electric would benefit." *Id.*

Tellingly, Respondents do not address *Manno Electric* at all in their Exceptions. The case Respondents *do* cite is not relevant to the issue at hand. In *Arkansas Lighthouse for the Blind v. NLRB*, 851 F.2d (8th Cir. 1988), the Eight Circuit denied enforcement of the Board Order, finding that the Board did not have jurisdiction over the employer because the employees were being "rehabilitated" by the employer and were not employees under the Act. Since the Eighth Circuit found that the Board could not assert jurisdiction over the employer, the Board also could not find the employer liable for any unfair labor practices. That fact pattern is entirely unrelated to the matter before ALJ Muhl.

Here, Respondents admit, and the ALJ correctly found, that Respondent Victoria's Market and Respondent Glen Lake's Market are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and therefor the Board has jurisdiction. JD 3:1-15. As explained above, Wartman Senior, Wartman Junior, and ART LLC do not each need to be found to be statutory employers in order to be found liable because they were acting "in concert and jointly" with Victoria's Market and Glen Lake's Market in bringing the retaliatory state law claims against the Union. See *Manno Electric*, 321 NLRB at 295.

In sum, relevant precedent establishes that individual respondents can be held liable for bringing a retaliatory lawsuit under the NLRA, despite not being statutory employers. Therefore, the Board should affirm the ALJ's finding that Respondents Wartman Senior, Wartman Junior, and ART LLC are liable for their actions in filing and pursuing the unlawful state law claims against the Union and reject Respondents' Exception No. 1.

B. The ALJ Correctly Held that Respondents Failed to Plead Conduct that Met the Standard for Tortious Interference

Respondents except to ALJ Muhl's decision that their claim for tortious interference was without any factual or legal basis based on his finding that they failed to plead or otherwise show that the tortious interference was accompanied by violence or threats of violence. Resp. Br. 12. Respondents further object that ALJ Muhl misstated the standard to bring a tortious interference claim in the context of a labor dispute, and argue that they did plead conduct that was sufficiently severe for an actionable claim of tortious interference in the labor law context.[4]

1. Respondents fail to meet the standard necessary to bring a tortious interference claim in the context of a labor dispute

ALJ Muhl correctly found that Respondents' claim for tortious interference is preempted by federal labor law. In the Eighth Circuit, under *BE & K Construction Co. v. United Brotherhood of Carpenters & Joiners of Am.*, Section 303 of the LMRA preempts state law tortious interference claims arising out of labor disputes because "state regulation cannot be allowed to interfere with th[e] balance" that Section 303 draws between a union's right to engage

[4] As explained above in Footnote 3, the Board generally deems as waived any arguments not made to the Administrative Law Judge in the underlying proceeding. See e.g., *Conditioned Air Systems, Inc.*, 360 NLRB 789, 789 fn. 2 (2014) (the Board deeming Respondent's arguments first raised in its exceptions waived as untimely raised); *Smoke House Restaurant*, 347 NLRB 192, 195 (2006) (same). Here, Respondents argue that their tortious interference claim survives preemption because the complaint also alleges defamation, and that their tortious interference claim is supported by allegations of violence and intimidating Union conduct. Respondents have not raised these arguments before, and as such, the Board should deem them untimely filed and dismiss them as waived, in addition to dismissing them on the merits.

in protected conduct and legitimate restrictions on threats and coercion. 90 F.3d 1318, 1328 (8th Cir. 1996). See also *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 252. 260-61 (1964) (holding that "state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities.")

Respondents allege no additional facts for the state law tortious interference claim beyond the claims that make up their Section 303 claim. Respondents even admit that the claims are identical in the lawsuit itself. See Jt. Exh. 1(N), ¶49 ("[The Union] intentionally interfered with [Respondents'] reasonable expectation of economic advantage in a manner that directly violated the LMRA."). Therefore, the entire basis for Respondents' state law claim is the alleged secondary conduct in the labor dispute. Clearly, the claim is preempted, and Respondents foreclosed the viability of Count II as a matter of law by relying on the secondary conduct and failing to adduce any additional facts or evidence in support of the state law tortious interference claim.

2. *Respondents did not plead or otherwise demonstrate that the Union engaged in violence or threats of violence, and therefore, the ALJ is correct in determining that their claim for tortious interference fails*

Respondents made no contention in the pleadings, or in the evidence presented, that the Union engaged in violent conduct at the new stores. JD 23:6-7. Respondents argue in their brief not that violent conduct occurred, but that tortious interference claims can be supported by evidence of intimidation rather than violence. However, the case they rely on includes violence and not just intimidation. In *Grinnell Fire Systems*, 328 NLRB 585, 603 (1999), the Board found that the "respondent's claims of tortious interference based on the union's nationwide strike would not be subject to Federal preemption if they were based on actions that involved violence." Citing *Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954). There, respondent submitted uncontradicted

testimony attesting to acts of violence and vandalism allegedly arising from the actions of strikers; thus, the acts described "alleged incidents of violence *and* intimidation occurring at picket lines established by the Union." *Grinnell Fire Systems*, at 603 (emphasis added). The Board goes on to state that such "violent and intimidating picket line activity…. is not protected by the Act, i.e. blocking an employee's egress from the Employer's facility, throwing objects at vehicles and their occupants, brandishing a weapon, and photographing individuals and copying license plate numbers." *Id*. at 604 (internal citations omitted). Thus, established caselaw, including Respondents' own cite, demonstrates that without Union violence, tortious interference claims are preempted. Despite Respondents' effort to mischaracterize caselaw, non-violent action alone does not equal tortious interference. Respondents cite no cases in support of their contention to the contrary

In their brief, Respondents highlight Wartman Junior's testimony that Union was "taking pictures of patrons, accosting patrons." Resp. Br. 17. However, this testimony was part of an almost-incomprehensible stream of consciousness in which Wartman Junior was trying to define secondary picketing, and was not developed on the record. Wartman Junior did not explain who was taking pictures, what was happening with the pictures, or what he meant by "accosting patrons." Thus, the evidence offered by Respondent was far too vague and conclusory to establish that any violence occurred.

For these reasons, the Board should confirm ALJ Muhl's finding that Respondents failed to plead conduct that meets the standard for tortious interference and reject Respondents' Exception No. 2.

C. The ALJ Correctly Found that Respondents Failed to Establish Any Prospective Economic Advantage to Support Their Claim of Tortious Interference

Respondents next except to ALJ Muhl's decision that their claim for tortious interference was without any factual or legal basis based on his finding that they did not identify specific third parties with whom they had a reasonable expectation of economic advantage. Resp. Br. 17. Respondents argue that ALJ Muhl applied the wrong standard to determine whether a legal claim can constitute an unfair labor practice by requiring that they actually prove the identity of specific third parties at this stage of the proceedings. Further, Respondents argue that they did introduce evidence that specific third parties were deterred from engaging in economic activity due to the Union's efforts.

In Minnesota, the elements to sustain a claim of tortious interference with prospective advantage are: 1) the existence of a reasonable expectation of economic advantage; 2) defendant's knowledge of that expectation of economic advantage; 3) that defendant intentionally interfered with plaintiff's reasonable expectation of economic advantage, and the intentional interference is either independently tortious or in violation of a state or federal statute or regulation; 4) that in the absence of the wrongful act of defendant, it is reasonably probable that plaintiff would have realized his economic advantage or benefit; and 5) that plaintiff sustained damages. *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 219 (Minn. 2014); JD 22:40-47. The Minnesota Supreme Court has made it clear that a plaintiff must identify "specific third parties with whom the plaintiff claims prospective economic relationships" and that "a plaintiff's projection of future business with unidentified customers, without more, is insufficient as a matter of law." *Id.* at 220-22; JD 23:19-21.

Respondents do not meet these requirements, but instead merely repeat the Section 303 allegations and label them as a claim under state law for tortious interference. JD 23:1-3;

Jt. Exh. 1(N), ¶46-51. Respondents pled only that they would have realized a greater economic advantage from operation of the new stores absent the Union's conduct. They did not plead, present any evidence at the hearing in this case, or identify evidence that they could obtain of specific third parties with whom the new stores reasonably expected to do future business. JD 23:19-24.

The closest Respondents come to the standard is alleging that due to the Union's activities, "Glen Lake's Market and Victoria's Market lost substantial business from its regular customers and goodwill in the community," and having Wartman Junior testify that he received "reports that customers said they were not going to shop at the new stores until the labor dispute resolved." Resp. Br. 19; Jt. Exh. 1(N), ¶38. However, Respondents offered no information about whether they did contact customers, how they would contact these customers, or how they would otherwise "establish specific customers," as required by the standard, who would have shopped at the new non-Union stores in the future but for the Union's activities. Since Respondents failed to identify any specific third parties with whom they claimed to have a prospective economic relationship, Respondents also failed to identify how the Union knew of those relationships and intentionally interfered with those relationships. Further, Respondents had the opportunity to explain their plans for discovery if the state court lawsuit had gone forward, but they failed to do so. Therefore, Respondents "did not plead, present any evidence at the hearing in this case, or identify evidence they could obtain of specific third parties with whom the new stores reasonably expected to do future business." JD 23:22-24. Respondents' claim lacks a reasonable basis.

Finally, Respondents misplace the burden of establishing specific customers whose business was lost on the General Counsel. In their Brief, Respondents argued they did not have more details to offer because discovery had not yet begun, and further, "it was not [their] burden

to prove all aspects of their case, rather it was General Counsel's burden to show Respondents 'could not have reasonably have believed [they] could acquire through discovery or other means evidence needed to prove essential elements of [their] causes of action.'" Resp. Br. 19, citing *Milum Textile Services Co.*, 357 NLRB 2047, 2053 (2011). This argument fails for three reasons. First, it would mean that Respondents' charge was legally deficient because their evidence fails to support the essential elements. Second, Respondents argued that they "only needed to show that they could prove these claims with discovery or other investigatory techniques," but did not attempt to make that showing. Resp. Br. 19, citing *Milum Textile*. In fact, there is nothing in the record about Respondents' discovery plan or what investigatory techniques they would use to establish these claims. Third, as argued in General Counsel's Exceptions Brief, dated August 14, 2017, at page 13-17, the General Counsel *has* more than sufficiently demonstrated that Respondents could not have reasonably believed they could acquire the evidence necessary to prove their causes of action. Respondents have not sufficiently refuted or overcome General Counsel's demonstration.

In sum, relevant precedent establishes that Respondents must establish the identity of specific third parties with whom they had a reasonable expectation of economic advantage. Respondents failed to do so, and therefore, the Board should affirm the ALJ's finding that Respondents failed to establish any prospective economic advantage to support their claim of tortious interference, and reject Respondents' Exception No. 3.

D. The ALJ Correctly Found That the Evidence Failed to Establish the Required Harm to Reputation to Support a Defamation Claim

Next, Respondents except to ALJ Muhl's finding that their claim for defamation was without any factual or legal basis, based on his finding that Respondents did not make any showing of actual compensatory damages. Respondents argue that the ALJ incorrectly required

them to prove "all aspects of their damages at the hearing," and that the ALJ misstated Minnesota and federal law as it relates to defamation *per se*.

Respondents argue (again) that the ALJ expected too much from them. They argue that because the civil lawsuit had only reached the initial pleading stage without any formal discovery, it was unfair for the ALJ to require them to prove their actual damages when all they actually needed to prove was that they had a reasonable basis to believe they would be able to prove their claims at trial. Respondents' argument is incorrect. The fact that the civil suit is only at the pleading stage does not affect the standard to which Respondents must be held by the ALJ. To meet their burden to prove a defamation claim, Respondents had to "plead and prove false statements were made with actual malice and resulted in compensable damages." JD 23:35-37. They did neither. In fact, Respondents did not even plead malice in their initial federal complaint, and only after the Union noted that omission in its Motion to Dismiss did Respondents amend their complaint to include a perfunctory allegation of actual malice. JD 24:5-8.

Respondents also failed to plead or prove any evidence of actual damages. JD 24:38-39. Under Minnesota state law, a plaintiff pursuing a defamation claim must prove the following elements: 1) that the defamatory statement is "communicated to someone other than the plaintiff;" 2) that the statement is false; 3) that the statement tends to harm the plaintiff's reputation and to lower the plaintiff in the estimation of the community; and 4) that the recipient of the false statement reasonably understands it to refer to a specific individual. *State v. Crawley*, 819 N.W.2d 94, 104 (Minn. 2012). When the statements are made within the context of a labor dispute, the plaintiff must also prove that the statements were made with actual malice and that the plaintiff incurred actual damages to avoid federal preemption. *Linn v. Plant Guard Workers*,

383 U.S. 53, 65 (1966); *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994); *Beverly Health & Rehabilitation Services*, 336 NLRB 332, 333 (2001). Respondents failed to prove either.

The Court implemented this requirement because "[l]abor disputes are ordinarily heated affairs…frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions," and without actual malice, libel actions in the context of a labor dispute would "interfere with the national labor policy." *Linn*, 383 U.S. at 55-58.

Based on this applicable caselaw, ALJ Muhl correctly held that Respondents' defamation claim failed because they did not plead and prove actual malice or compensable damages. In fact, neither the Respondents' initial federal complaint nor the amended complaint contains any facts to support a finding of compensatory damages. JD 25:8-9. Respondents pled generally that the Union's comments about "Tom Wartman" caused damages "in an amount in excess of $75,000." JD 8:9-10; Jt. Exh. 1(N) ¶64. Respondents provided no facts in either the pleadings or during the hearing to support their claim of damages. Instead, Respondents make only conclusory assertions that the alleged defamation caused Wartman Senior and Wartman Junior damages. Wartman Senior admitted that there was no damage calculation and Respondents' own attorney admitted at hearing that $75,000 was the number that conforms to the minimum amount necessary for jurisdictional purposes. JD 25:10-12, 37-39; Tr. 265, 268.

Respondents argue in their Brief that they presented evidence that they suffered damages for defamation *per se*, which is a state law standard. Resp. Br. 22. However, Federal law requirements preempt Minnesota state law, so defamation *per se*, without actual damages evidenced, is not the appropriate standard. Accordingly, Counsel for the General Counsel

respectfully urges the Board to affirm the ALJ's finding that Respondents' defamation claim was not reasonably based, and reject Respondents' Exception No. 4.

E. The ALJ Correctly Found Respondents Filed the Lawsuit with a Retaliatory Motive

Finally, Respondents except to the ALJ's decision that their state law claims of tortious interference and defamation could form the basis of an unfair labor practice because those claims "received a small fraction of the attention of the parties." Respondents argue that ALJ Muhl "erred in ordering retaliation sanctions based on his analysis of relatively minor claims." Resp. Br. 25.

Respondents' argument in support of this final exception is that a retaliatory motive cannot be found when the primary claim is held not to be frivolous. Resp. Br. 25. Respondents cite *NLRB v. Allied Mechanical*, 734 F.3d 486 (6th Cir. 2013), for this proposition because there the Sixth Circuit stated "their inclusion in the complaint appears more like thorough lawyering and less like frivolity. Certainly the entire case cannot be made baseless by their erroneous inclusion." *Id.* at 492-93. However, the Court was not talking about the inclusion of secondary claims, but the inclusion of two local union entities as well as two international unions. The issue there was whether the international unions had any relationship to the events complained of, not whether secondary claims could be found to be unlawful if the primary claims were not. Respondents completely missed the mark.

Respondents fail to recognize that the amount of time and attention each claim receives has nothing to do with whether those claims constitute an unfair labor practice. The amount of time spent on each claim has no bearing on the claim's lawfulness, but merely contributes to the calculation of damages.

General Counsel also notes that Respondents do not challenge any of the ALJ's findings with respect to the evidence that supports the retaliatory motive; their exception is limited to the fact that the ALJ found these "secondary" claims to be retaliatory while he found the "primary" claim was not frivolous.

Since no exception has been taken to the ALJ's finding that Respondents' lawsuit was filed with a retaliatory motive, the Board should affirm the ALJ's conclusion that Respondents' state law claims were retaliatory and the Union is entitled to reimbursement for legal and other expenses incurred in defending those claims, and reject Respondents' Exception No. 5.

IV. CONCLUSION

For all of the reasons cited above, Counsel for the General Counsel respectfully requests that the Board reject and dismiss each of Respondents' Exceptions and their Brief. It is further urged that the Board adopt the ALJ's findings and conclusions that Respondents violated Section 8(a)(1) by filing state law claims against the Union that lack a reasonable basis and were filed with a retaliatory motive.

Dated: August 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was served by electronic mail on the 28th day of August, 2017, on the following parties:

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